No. 15,913

United States Court of Appeals

For the Ninth Circuit

JOSE DIAS DE SOUZA,
Appellant,

vs.

BRUCE G. BARBER, Director of Immigration and Naturalization,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLEE'S REPLY BRIEF.

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Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLEE'S REPLY BRIEF.

JURISDICTION.

By his petition for a writ of habeas corpus appellant sought and obtained a judicial review of the administrative record of the appellee wherein appellant was determined to be an alien illegally in the United States, and whereby he was ordered deported. Jurisdiction of the District Court is specified in Title 28 U.S.C. 2241 and appeal to this Court in Section 2253 of the same title.

The necessity for resorting to habeas corpus as the means of judicial review followed the action of re-

spondent in taking petitioner into custody on January 8, 1958.

From the decisions of this Court of Appeals, the scope of judicial review, whether by habeas corpus after custody or by petition for review prior to custody, would appear to be similar.

Shaughnessy v. Pedreiro, 349 U.S. 48;

Rystad v. Boyd (9th Cir.), 246 F.2d 246, cert. den. 355 U.S. 912, 967;

Leonard Cruz-Sanchez v. Robinson, 249 F.2d 771.

STATUTES.

8 U.S.C. Sec. 1252 (Immigration and Nationality Act 1952, Section 242)

. . .

(e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4) . . . of section 1251 (a) of this title. (f) Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the

date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

8 U.S.C. Sec. 1251 (Immigration and Nationality Act 1952, Sec. 241)

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

. . .

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, . . .

8 U.S.C. 1182 (Immigration and Nationality Act 1952, Sec. 212)

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States;

. . .

(17) Aliens who have been arrested and deported, or who have fallen into distress and have been removed pursuant to this chapter or any prior act, or who have been removed as alien enemies, or who have been removed at Government expense in lieu of deportation pursuant to section 1252(b) of this title, unless prior to their embarkation or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their applying or reapplying for admission.

8 C.F.R. Sec. 242.6

Aliens deportable under section 242(f) of the act. In the case of an alien within the purview of section 242(f) of the act, the order to show cause shall charge him with deportability only under section 242 (f) of the act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportation under that section.

8 C.F.R. 242.3

Aliens confined to institutions; incompetents, minors—(a) Service. If the respondent is confined in a penal or mental institution or hospital and is competent to understand the nature of the proceedings, a copy of the order to show cause, and the warrant of arrest, if issued, shall be served upon him and upon the person in charge of the institution or hospital. If the respondent is not competent to understand the nature of the proceedings, a copy of the order to show cause, and the warrant of arrest, if issued, shall be served only upon the person in charge of the institution or hospital in which the respondent is confined, such service being deemed service upon the respondent. In case of mental incompetency, whether or not confined in an institution, and in the case of a child under 16 years of age, a copy of the order and of the warrant of arrest, if issued, shall be served upon such respondent's guardian, near relative, or friend, whenever possible.

8 C.F.R. 242.22

Proceedings under section 242 (f) of the act—(a) Applicable regulations. Except as hereafter

provided in this section, all the provisions of §§ 242.8 to 242.21, inclusive, and § 242.23 shall apply to the case of a respondent within the purview of § 242.6.

(b) Deportability. In determining the deportability of an alien alleged to be within the purview of § 242.6, the issues shall be limited solely to a determination of the identity of the respondent, i. e. whether the respondent is in fact an alien who was previously deported, or who departed while an order of deportation was outstanding; whether the respondent was previously deported as a member of any of the classes described in paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a) of the act; and whether respondent unlawfully reentered the United States.

(c) Order. If deportability as charged pursuant to § 242.6 is established, the special inquiry officer shall order that the respondent be deported under the previous order of deportation in accordance with section 242 (f) of the act, or shall enter such other order as may be required for the appropriate disposition of the case.

Immigration Act of May 26, 1924

Sec. 14. (8 U.S.C. 214 (1946 ed.)) Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of

1252(f), the previous order of deportation was deemed to be reinstated from its original date and appellant was ordered deported thereunder.

An appeal to the Board of Immigration Appeals was dismissed January 6, 1958.

The petition for writ of habeas corpus herein was filed January 9, 1958. The writ was denied on February 12, 1958, and the notice of appeal was filed February 14, 1958.

Exhibit 3 of the Certified Record (Exhibit 1) is the Record of Sworn Statement of appellant dated August 9, 1957. On page 4 he claims first entry to the United States about the 12th of October, 1912, at the Port of Providence, Rhode Island. Exhibit 2 of the Certified Record contains the 1929 record, which was made a part of the 1957 proceedings. Appellant in his statement of March 14, 1929, and May 14, 1929, claimed to have first entered the United States at New York, October 8, 1916.

Exhibit 3, page 7 and the May 14, 1929 statement, disclose that in 1926 appellant served four months in the Preston School of Industry at Ione, California, on a charge of forgery.

Exhibit 3, pages 7 and 8 also disclose that appellant has a wife living in Portugal from whom he has not been divorced. This was his second marriage. The number of children from the two marriages is not indicated.

Appellant claims two illegitimate children in Porterville are dependent upon him for support, although

as of August 9, 1957, a "paternity action" was pending against him in Tulare County.

The statement of March 14, 1929, signed by appellant (Ex. 2 of Ex. 1), contains the admission that he left the United States February, 1926, going to Mexico, and that he entered the United States at Calexico, California, in February, 1926, without inspection. The statement of May 14, 1929, contains a similar admission.

A warrant was issued by the Assistant Secretary of Labor on June 7, 1929, and charged "that the alien Jose Marcus Souza or Joseph Marcus Souza (appellant herein, Exhibit 3, page 1) who landed at the port of Calexico, California, on or about the 15th day of February, 1926, has been found in the United States in violation of the Immigration Act of February 5, 1917, for the following among other reasons:

That he has been sentenced, subsequent to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, to wit: Issuing bank checks with intent to defraud committed within five years after his entry."

The hearing on the warrant was held at San Quentin on October 4, 1929. A copy of the Report of Hearings is attached hereto as Appendix "A".

QUESTIONS PRESENTED.

Upon appellant's specification of errors, appellee frames the following questions:

(1) The petitioner having been found to be deportable under 8 U.S.C. 1252(f), was respondent required to entertain a collateral attack upon the 1929 final order under which petitioner was previously deported?

(2) Should the Court below have reviewed the 1929 order?

(3) Assuming review of the 1929 order does the record disclose lack of due process or absence of a fair hearing or any other infirmity?

ARGUMENT.

The appellant was deported on December 2, 1930, pursuant to the final order of the Assistant to the Secretary of Labor of November 21, 1929, and the warrant of deportation issued December 5, 1929 (Exhibit 2). The said final order was made following the recommendation of the Chairman of the Board of Review.

Appellant unlawfully entered the United States June 29, 1957, from Mexico. He was not in possession of a valid immigration visa or a valid non-immigrant visa or permit to enter as a visitor nor had he obtained the consent of the Attorney General (8 U.S.C. 1182(a)(17)). He was destined to Porterville, California, and intended to stay permanently.

From appellant's statement (p. 5) Exhibit 3 of the certified record (Ex. 1) and his passport, Exhibit 4, at least three entries to the United States as a non-immigrant were effected prior to June 29, 1957.

The first, on June 13, 1951, at New York on a transit certificate, ultimate destination Canada. He entered Canada June 14, 1951, and returned June 18, 1951, by air, reentering the United States at New York. He returned to Portugal sometime in August, 1951.

The second entry was effected November 29, 1951, on a non-immigrant visa as a temporary visitor. The passport Exhibit 4 contains no visa, admission stamp or other information beyond the non-immigrant visa dated November 20, 1951.

According to appellant's statement, page 5 (Ex. 3) he departed the United States in February, 1953, at New York.

The third entry was effected September 27-29, 1953, at San Ysidro, California. Appellant claims a new passport was issued, but that the non-immigrant visa on the old passport was still valid. He claims he surrendered the 1953 passport when a third passport was issued in 1955.

Following the entry in 1953 at San Ysidro appellant remained in the United States until December 14, 1956, when he entered Mexico intending to make a "very brief visit." He reentered the United States at Christmas on a 72 hour permit.

He was given no permit of any sort when he was admitted at San Ysidro in 1953 and his recollection (page 6) is that he was admitted for 30 days.

At no time prior to 1957 was any claim made by appellant that he was entitled to enter the United States because of any illegality of the deportation of 1930. No application was made to the attorney general in accordance with 8 U.S.C. 1182(a)(17) for consent to apply for admission. The record does not disclose whether he made any other unlawful entries between December, 1956, and June, 1957.

I. A DETERMINATION OF DEPORTABILITY UNDER SEC. 242(f) DOES NOT PERMIT A COLLATERAL ATTACK ON THE REINSTATED ORDER OF DEPORTATION.

This Court is familiar with the basis upon which a final order of deportation is to be reviewed judicially both before and after the 1952 Act. An exhaustive collection of the cases is contained in the annotation to *United States ex. rel. Knauff v. Shaughnessy,* 94 Law.Ed. 317 at page 332.

The specific statute under which appellant was determined to be deportable is 242(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1252(f)). This section was carried forward from section 20 of the Immigration Act of 1917 as amended by the *Internal Security* Act of 1950, Sec. 23 (8 U.S.C. 156(d), 1946 ed. Supp. IV. Subdivision (d) of Sec. 20 of the 1917 Act had been added as an amendment by Sec. 23 of the Internal Security Act of 1950, Sep-

tember 23, 1950. Section 156(d) was repealed by the 1952 Immigration and Nationality Act but was reenacted in said Act as Section 242(f), Title 8 U.S.C.A. 1252(f), which provides:

> "Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation."

Appellee has been able to find only one case concerned with Sec. *242(f), United States ex rel. Blankenstein v. Shaughnessy,* June 12, 1953, S.D.N.Y. 112 F.Supp. 607. In that case a petition for writ of habeas corpus was filed in May, 1953. The warrant charged that the alien was deportable on four separate grounds, all under Sec. 241(a) (8 U.S.C.A. 1251 (a)). Petitioner had been ordered deported by a final order of deportation in 1924. The order had not been immediately executed, but in May of 1930 the petitioner had left the United States. The legality of the warrant of arrest was attacked on the ground that the Attorney General was compelled to reinstate the order of May, 1924, in that the "sole and exclusive"

remedy for deporting him was governed by Section 242(f). On this point Judge Weinfeld at page 610 held:

> "There is no automatic reinstatement of the previous order of deportation. Section 242(f) specifically provides '*Should the Attorney General find* that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation . . . the previous order of deportation shall be deemed to be reinstated from its original date . . .'. (Emphasis supplied.) Thus the Attorney General is required to make a finding (1) that the alien whose deportation is now sought is the same person against whom the previous order of deportation was issued; (2) that he either previously departed or had been deported as a member of the classes enumerated in §242(e) of the Act; and (3) that he had unlawfully reentered. 8 C.F.R. §242.75. Then and only then is the previous order of deportation reinstated. And such findings by the Attorney General may be made only after notice of the charge to the alien and a hearing thereon. Sec. 242(b) of the Act, 8 U.S.C.A. 1252(b); see also 8 C.F.R. 242.73. In other words, a charge that an alien is deportable because he illegally reentered after he had either departed or had been deported under a prior order of deportation is treated, with exceptions not here material, in the same manner as any other charge upon which an alien's deportation is sought."

Appellant *de Souza* was ordered deported on one charge: Section 242(f) — previously deported on

grounds enumerated in Section 242(e). A hearing was held on this charge. Appellant was determined to be the same person who was deported on December 2, 1930, on a final order of deportation and warrant issued thereon on a ground enumerated in §242(e), to wit: §241(a)(4)—convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution for a year or more. He admittedly reentered the United States unlawfully at San Ysidro, California, on June 27, 1957. Appellant does not challenge the hearing on the determination of the essential elements for reinstatement of the previous order. He admits he is the person deported in 1930 on a charge under 242(e) and that he unlawfully reentered the United States in 1957. He admits he had no consent of the Attorney General to reenter as required by 8 U.S.C. 1182(a)(17). By his petition he seeks to reopen the 1929 proceedings and review the order on which he was deported in 1930.

Appellant de Souza does not contend that there was any failure to comply with the requirement of §242(b) (8 U.S.C.A. 1252(b)) in so far as the determination was made under §242(f) that the prior order of deportation be deemed reinstated. His contention goes to claimed infirmities in the 1929 proceedings. As the Court below said (tr. 16) "The petitioner would have this Court disinter his first deportation order which was issued in 1930 and examine the evidence on which it was based."

(1) Under §242(f) appellant may not challenge the prior order reinstated.

The key to Sec. 242(f) is "unlawfully reentered." The Court will readily acknowledge the necessity for reaching finality in orders, judgments and decrees. The burden upon one who would attack a judgment long since final is heavy. Assuming the collateral attack may be made, the manner in which it is made must be lawful. By Section 242(f) Congress has precluded an attack upon the prior order by a person who gained *unlawful reentry* to the United States. If there is a challenge to the legality of an order of deportation which has been executed by the deportation of the alien, it should be made directly by the seeking of lawful entry. The alien then places himself in the same position as any other alien seeking entry. Sec. 212 (8 U.S.C.A. 1182) and 236 (8 U.S.C.A. 1226) would be applicable.

Appellant *de Souza* had many opportunities from 1951 to 1957 to have sought legal entry to the United States if there were any merit to his contentions herein. He made no attempt to obtain the consent of the Attorney General (8 U.S.C. 1182(a)(17)). He apparently had no difficulty prior to December 1956 in entering as he pleased on the documents in his possession.

(2) Absent. Sec. 242(f), the Court will not examine the previous order unless convinced there was a gross miscarriage of justice.

United States ex rel. Steffner v. Carmichael, 183 F.2d 19 (5th Cir.) cert. den. 340 U.S. 829, was a case

which arose prior to the Internal Security Act of 1950 and the amendment of Section 20 of the 1917 Act. Steffner had been deported in 1936 to Sweden. In 1941, he began shipping in and out of the United States as a seaman. In 1945 he reentered the United States as a member of a crew of a Swedish liner, deserted his ship and remained in the United States without a visa and without having secured permission of the Attorney General to apply for readmission. He was found deportable (1) in that he was an alien who admitted having committed a felony involving moral turpitude prior to entry, (2) he was an alien who had been arrested and deported in pursuance of law and to whom proper authority had not been given to reapply, and (3) he was an alien not in possession of a valid visa. Steffner filed a petition for a writ of habeas corpus. The question of primary concern presented was whether or not appellant should be allowed to make a collateral attack on the 1936 deportation order which he contended was illegal and void *ab initio*. The Court said at page 20:

> ". . . If we do allow such an attack, we must then examine the order ourselves to determine its validity."
>
> "Where an alien has been deported from the United States pursuant to a warrant of deportation, we do not think it permissible to allow a collateral attack on the previous deportation order in a subsequent deportation proceeding unless we are convinced that there was a gross miscarriage of justice in the former proceedings. There are numerous cases where aliens have been deported several times and if in each subsequent

case the validity of the previous deportation order had to be determined, there would be no end to the proceedings cast upon administrative agencies.

"Appellant did not elect to test the validity of his 1936 deportation order. He had his day before the immigration authorities who decided he should be deported. There is no showing that his failure to test the validity of this order was due to any cause other than his desire not to do so. Even if we were to concede that we should examine the order entered in his 1936 deportation proceeding, appellant would not be in any better position than he is now, because we are of the opinion that such an order was valid when entered, and since it has not been set aside in any way, it remains valid."

United States ex rel. Rubio v. Jordan (7th Cir.), 190 F.2d 573 (July 24, 1951);

United States ex rel. Beck v. Neely (7th Cir.), 202 F.2d 221;

Daskaloff v. Zurbrick (6th Cir.), 103 F.2d 579.

Assuming that notwithstanding the express language of Section 242(f), the Court may in a proper case examine the record of the administrative proceedings of the reinstated order, the test of such a proper case would be a *gross miscarriage of justice.* No such finding could be made in this case. The record of Jose Dias de Souza belies any miscarriage of justice let alone a *gross* miscarriage.

(3) Should the Court examine the record of the reinstated order such examination would be a review in accordance with the established principles.

(a) *Due Process:*

94 Law. Ed. 332;
Tisi v. Tod, 264 U.S. 131;
Zakanaite v. Wolf, 226 U.S. 272;
Low Wah Suey v. Backus, 225 U.S. 460;
Ng Fung Ho v. White, 259 U.S. 276.

(b) *Fair Hearing:*

94 Law. Ed. 332-33;
Tisi v. Tod, supra;
Vajtauer v. Comm'r., 273 U.S. 103, 71 Law. Ed. 560;
Chin Yow v. United States, 208 U.S. 8.

(c) *Evidence Must Support the Deportation Order:*

Bilokumsky v. Tod, 263 U.S. 149.

The requirement of reasonable substantial and probative evidence was added by the 1952 Act §242(b), 8 U.S.C. 1252(b).

Appellant herein was afforded due process and a fair hearing during the 1929 proceedings and the evidence not only supports the findings but is reasonable substantial and probative.

Del Guercio v. Delgadillo, 159 F.2d 130 (9th Cir.);
Steffner v. Carmichael, supra;
United States ex rel. Beck v. Neelly, supra;

DeBernardo v. Rogers (D.C. Cir.), 254 F.2d 81;

Bisaillon v. Hogan (9th Cir.), July 1, 1958. No. 15749.

(4) The determination that appellant in 1926 on "numerous occasions" and specifically February 15, 1926 reentered the United States after departure to Mexico was not an erroneous application of law.

Appellant having committed a crime involving moral turpitude for which he was sentenced to one to fourteen years in the State Prison at San Quentin can seek to avoid the impact of this fact on his status as alien by claiming it was not committed within five years after his entry. The crime having been committed in 1929 and appellant having departed the United States into Mexico in 1926, the only claim that can be made is "no entry."

Assuming of course that the Court reaches the matter of review of the 1929 order, the contention would be that of an erroneous application of law.

The decisions of the Supreme Court and the Ninth Circuit Court of Appeals permit no challenge to the determination that appellant made an entry in 1926.

United States ex rel. Claussen v. Day, 279 U.S. 398;

United States ex rel. Stapf v. Corsi, 287 U.S. 129;

United States ex rel. Volpe v. Smith, 289 U.S. 422;

Schoeps v. Carmichael, 177 F.2d 391 (9th Cir.), cert. den. 339 U.S. 914;

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United States ex rel. Alcantra v. Boyd, 222 F.2d 445 (9th Cir.);
Talavera v. Barber, 231 F.2d 524 (9th Cir.);
Zurbrick v. Borg, 47 F.2d 690 (6th Cir.);
Pimental-Navarro v. Del Guercio (9th Cir.) No. 15745, June 12, 1958.

Appellant relies on *Valenti v. Karnuth,* 1 F.Supp. 370, and *Wong Yuen v. Prentis,* 234 F. 28. These two cases are not subsequently cited as authority in any of the cases to which the Courts attention has been called above. In *United States ex rel. Dombrowski v. Karnuth,* 19 F.Supp. 222, the *Valenti* case is cited as in conflict with the weight of authority.

Appellant cites *Ex Parte T. Nagata,* 11 F.2d 178, to which might be added *Nakasuji v. Seager* (9th Cir.), 3 F.Supp. 410, aff. 73 F.2d 37, cert. den. 294 U.S. 714. In each of these cases the alien went fishing in Mexican waters. The holding was no entry on return. No landing at any foreign port had been effected.

Weedin v. Okada, 2 F.2d 321 (9th Cir.), upon which appellant places some reliance, is cited in *Ex Parte Delaney,* 72 F.Supp. 312. The District Judge referred to the *Okada* case in footnote 11, page 319 ". . . which decision antedates the group of decisions under discussion, and which it would seem has been

subsequently overruled by the Ninth Circuit." *Ex Parte Delaney* came to this Court of Appeal as *Carmichael v. Delaney,* 170 F.2d 239, and the District Court was reversed (1948). At page 242 this Court said:

> "Does the return of a resident under these circumstances constitute an entry within the intendment of the immigration laws? We think not. It is true that until very recently except for an enlightened decision of the Second Circuit, *DiPasquale v. Karnuth,* 158 F.2d 878, the Federal Courts had fallen into the habit of treating every arrival from a foreign port or place as an entry no matter what the circumstances or however harsh and unanticipated might be the consequence to the individual."

Judge Rudkin's opinion in *Matsutaka v. Carr,* 47 F.2d 601, clarifies the distinction between *United States ex rel. Claussen v. Day,* 279 U.S. 398, and *Carmichael v. Delaney, supra.* At page 601 he said,

> "In other words in the Claussen case the Court was only concerned with the fact of entry, while in this case we are chiefly concerned with the right of entry."

In other words the person who had shipped on an American vessel as a member of the crew, could not be excluded as not in possession of proper documents upon his return aboard the same ship even though the ship may have touched at a foreign port. But if the alien committed a crime involving moral turpitude within five years of such return, although he could not have been excluded at the time of such reentry

nevertheless the *fact* of entry fixed the time insofar as the five years was involved.

Delgadillo v. Carmichael, 332 U.S. 388, decided by the Supreme Court in 1947, permitted a technical avoidance of the doctrine of *United States ex rel. Claussen v. Day, United States ex rel. Stapf v. Corsi* and *United States ex rel. Volpe v. Smith,* supra, and the *fact* of entry. The Court said, page 390,

> "Here he was catapulted into the ocean, rescued, and taken to Cuba. His itinerary was forced on him by wholly fortuitous circumstances."

Delgadillo had shipped out of Los Angeles on an intercoastal voyage to New York as the member of the crew of an American merchant ship. The ship was torpedoed after passing through the Panama Canal. He was rescued and taken to Havana, Cuba, and returned to the United States. The Supreme Court held,

> "We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous as capricious as those which the Immigration Service has here seized."

Appellee does not believe appellant can derive any comfort from *Delgadillo v. Carmichael,* and whether we look to the law as of 1929, which would not have required considering the *Delgadillo v. Carmichael* or *Carmichael v. Delaney* deviations or to the law today, appellant made an entry in 1926.

CONCLUSION.

Appellee submits:

(1) Section 242(f) requires the determination of the essential elements of identity, prior deportation and unlawful entry to reinstate the previous order and the Court cannot review the administrative record out of which the prior order was made.

(2) Assuming the Court may review the old record, a showing of a gross miscarriage of justice must be made. No such showing has been made here.

(3) Assuming the record is reviewed, this Court must conclude the hearing was fair, there was due process, the evidence supports the findings and there was no erroneous application of law.

Dated, San Francisco, California,
August 25, 1958.

Respectfully submitted,

ROBERT H. SCHNACKE,
United States Attorney,

CHARLES ELMER COLLETT,
Assistant United States Attorney,

Attorneys for Appellee.

(Appendix "A" Follows.)

Appendix "A"

Appendix "A"

File No. 12020/15653

Report of Hearing in the Case of
Jose Marcus Souza or Joseph Marcus Souza

Under Department warrant No. 55670/55.

Dated Washington, D. C., June 7, 1929.

Hearing conducted by Inspector J. A. Neilson, J.

At San Quentin, Calif., Dated 10-4-29.

Alien taken into custody at California State Prison, San Quentin, October 4, 1929, at 2:00 P.M., by Inspector J. A. Neilson, Jr. and detained in above institution.

Testimony taken and transcribed by S. A. Byrne, Jr., Stenographer.

Said alien being .....able to speak and understand the English language satisfactorily ..... interpreter, named ....., competent in the ..... language, was employed .....

Said alien was informed that the purpose of said hearing was to afford him an opportunity to show cause why ...he should not be deported to the country whence ...he came, said warrant of arrest being read and each and every allegation therein contained carefully explained to him. Said alien was offered an opportunity to inspect the warrant of arrest and the evidence upon which it was issued, which privilege

was ..... accepted. The alien being first duly sworn ....., the following evidence was presented:

Q. What is your correct name?

A. Joseph Marcus Souza.

Q. Have you ever been known by another name?

A. No.

Q. You are advised that under these proceedings you have the right to be represented by counsel. Do you desire to obtain the services of a lawyer?

A. No. I can handle this myself.

Q. Do you waive your right to be represented by an attorney and are you now ready and willing to proceed with this hearing?

A. Yes.

Q. You are advised that Attorney W. D. Hahesy, of Tulare, California, has stated that he wished to be present at this hearing. Is it your wish that he be present at this hearing and represent you in these proceedings?

A. No. He was not hired by me. I don't want his services whatsoever.

Q. You waive your right to the services of Attorney Hahesy?

A. Yes.

By Inspector:

You are advised that the burden of proof is upon you to show that you entered the United States lawfully and the time, place and manner of such entry. In presenting this proof, you are entitled to the production of your immigration visa, if any, or any documents pertaining to your entry now in the custody of the Department of Labor.

Q. Did you make a sworn statement to an Inspector of the Immigration Service at this prison, May 14, 1929?

A. Yes.

Q. Are all the answers given by you at that time true and correct?

A. Yes.

Q. Have you any changes to make in that statement? (Alien reads statement.)

A. No.

By Inspector:

You are advised that the sworn statement mentioned is now incorporated in and made a part of this record.

Q. Have you any evidence to offer or reasons to give why you should not be deported on the charge contained in the warrant of arrest?

A. I was working for Mr. A. C. Glass, who is in the produce business at the Terminal Market, 7th and Central, Los Angeles, and in the course of my duties I crossed the line into Mexico on numerous occasions. I never did stay over there more than an hour and a half at any time. I never lived in Mexico. All my people are here. They are taxpayers and haven't been out of the country for about 18 years. I was raised and educated here, and know no other country whatsoever. The reason I am not a citizen is because I haven't reached my majority. My two brothers are naturalized citizens. (Alien advised regarding penalty for illegal reentry.)

Q. Have you anything further to state?

A. No.

Summary:

This alien is a male, 19 years of age, auctioneer, single, native of Azores Islands, subject of Portugal, Port. race, who last entered the United States without inspection at Calexico, Calif., during the month of February, 1926. He has been sentenced, subsequent to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, to wit: issuing bank checks with intent to defraud—committed within five years after entry.

Recommendation:

The charge contained in the warrant of arrest is sustained by the record. It is recommended that the alien be deported.

J. A. Neilson, Jr.,
Immigrant Inspector.

I certify that the foregoing is a true and correct transcript of the record of hearing in the above case.

S. A. Byrne, Jr.,
Stenographer. bk. 13663.